

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 03-4094-CV-C-SOW
)	
MONITEAU COUNTY,)	
and THE COMMISSIONERS OF)	
MONITEAU COUNTY,)	
)	
Defendants.)	

CONSENT DECREE

WHEREAS, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1287, known as the “Clean Water Act” (“CWA”), and the implementing regulations of the United States Army Corps of Engineers (“Corps”), 33 C.F.R. pts. 320-330, were enacted and promulgated to restore and maintain the chemical, physical and biological integrity of the nation’s waters, as set forth in CWA Section 101, 33 U.S.C. § 1251;

WHEREAS, CWA Section 404, 33 U.S.C. § 1344 (“Section 404”) authorizes the Secretary of the Army (“Secretary”), acting through the Chief of Engineers of the Corps, to issue permits for discharges of dredge or fill material into navigable waters;

WHEREAS, such permits may be issued by the Corps as individual permits or as general permits on a state, regional or nationwide basis;

WHEREAS, it is a violation of CWA Section 301(a), 33 U.S.C. § 1311(a) (“Section 301(a)”) for any person to discharge dredged or fill material, which is defined to include, *inter*

alia, rock, sand, dirt, discarded equipment, and structures, into navigable waters except in compliance with Section 404;

WHEREAS, CWA Section 502(7), 33 U.S.C. § 1362(7) and Corps regulations as 33 C.F.R. § 328.3(a) define navigable waters as waters of the United States, which include, *inter alia*, all tributaries to interstate waters and all tributaries to waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce;

WHEREAS, CWA Section 309(b), 33 U.S.C. § 1319(b), authorizes the United States to bring a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates Section 301(a) by discharging dredged or fill material into waters of the United States without a permit granted pursuant to Section 404;

WHEREAS, the discharge of dredged material includes any redeposit of dredged material, other than incidental fallback, within waters of the United States;

WHEREAS, the use of earth-moving equipment or other heavy machinery in the streambed of a stream that is a water of the United States, below the ordinary high water mark as defined in 33 C.F.R. § 328.4(c)(1), for the purpose of gravel mining or bank stabilization, constitutes the discharge of dredged or fill material into a water of the United States;

WHEREAS, the placement of bank stabilization structures below the ordinary high water mark of a water of the United States constitutes the discharge of dredged or fill material into a water of the United States;

WHEREAS, the United States, on behalf of the Corps, filed the Complaint herein against defendants Moniteau County and the Commissioners of Moniteau County (“Commissioners”) (together with Moniteau County, “Defendants”), alleging that Moniteau County violated CWA Section 301(a) by conducting in-stream gravel mining at a site on the Little Moniteau Creek and

an unnamed tributary thereof, both in Section 8, Township 45 North, Range 14 West, in Moniteau County (the "Little Moniteau Creek Site"); by conducting in-stream gravel mining in a portion of Splice Creek from a point approximately 1,600 feet upstream of the Route H bridge and extending approximately 3,900 feet upstream, in Sections 11, 12 and 14, Township 47 North, Range 15 West, in Moniteau County (the "Splice Creek Site"); and by placing turkey crates filled with rock into a portion of the Splice Creek Site for the purpose of bank stabilization (both sites together hereinafter "the Sites"), all without an individual permit from the Corps or proper authorization or verification from the Corps to proceed under a general permit; and further alleging that the affected creeks are waters of the United States;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree ("Decree") is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case;

WHEREAS, this Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint; and

WHEREAS, the Court finds that this Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Western District of Missouri pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY AND SCOPE OF DECREE

4. The obligations of this Decree shall apply to Moniteau County, the Commissioners of Moniteau County and their successors, and any other official of Moniteau County whose cooperation is necessary for Moniteau County to comply with this Decree. The Commissioners and other officials shall not be personally liable for the cost of compliance herewith.

5. If any Commissioner of Moniteau County ceases to be a Commissioner, he shall have no further obligation under this Decree, except that if he retains documents that are subject to the record retention requirements of Section VI below, he shall continue to comply with that section.

6. This Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. § 1342 or 1344, or any other law. Nothing in this Decree shall limit the ability of the Corps to issue,

modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit; nor shall this Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

7. This Decree shall constitute a complete and final settlement of all civil claims by the United States for penalties against Moniteau County or its Commissioners for the discharge of dredged or fill material into waters of the United States as a result of in-stream gravel mining or stream bank stabilization activity by Moniteau County occurring before May 9, 2003, the date of the Complaint herein, and shall constitute a complete and final settlement of all civil claims for injunctive, restorative or mitigative relief for the in-stream gravel mining or bank stabilization activities at the Sites and which are the subject of the Complaint.

8. Except as provided in Section IV hereof, this Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit and will not be construed to negate or limit any requirement of the CWA or Corps regulations, or to excuse Moniteau County from complying therewith. Nothing in this Decree restricts routine road maintenance so long as it is not within the waters of the United States. Nor does this Decree restrict any right that Moniteau County has under exemptions applying to road or ditch maintenance under the CWA or Corps regulations.

9. This Decree in no way limits the rights of the United States as against any person not a party to this Decree.

10. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Decree and applicable law.

11. Nothing in this Decree shall constitute an admission of fact or law by any party.

III. INJUNCTIVE PROVISIONS

12. Except as required to comply with the mitigation and restoration provisions in Section IV below, Moniteau County is permanently enjoined from discharging dredged or fill material, as defined in 33 C.F.R. §§ 323.2(c) and (e) and any successor provision of Corps regulations, except in conformity with CWA Section 404. The use of earth-moving equipment or other heavy machinery in streambeds, below the ordinary high water mark as defined in 33 C.F.R. § 328.4(c)(1), for the purpose of gravel mining or bank stabilization, will be deemed a discharge of dredged or fill material requiring a Corps permit, as will any bank stabilization activity below the ordinary high water mark. If in doubt as to whether an act is prohibited by the CWA, Moniteau County will consult the Corps before undertaking the act. For the purpose of this Decree, a “bank stabilization activity” is any placement, replacement or supplementation of dredged or fill material, or the construction or placement of any structure, on a channel bank, between the bed of the channel and the edge of the high bank, for the purpose of controlling erosion or preventing channel migration. The provisions of this paragraph are subject to the provisions of paragraph 8.

13. Moniteau County will not conduct in-stream gravel mining or stream bank stabilization activities on land that the Corps is not authorized to enter for the purpose of determining compliance with the CWA. All authorizations secured by Moniteau County for entry on private land by which Moniteau County conducts in-stream gravel mining or undertakes any bank stabilization activity shall include a provision authorizing the same entry by the Corps, upon no more than five days notice to the landowner and Moniteau County, for the purpose of determining the compliance of Moniteau County with the CWA. The authorization for entry by the Corps shall extend at least three months beyond the time that the gravel mining or bank

stabilization activity is to be completed. Moniteau County will make such authorization available to the Corps upon request. If Moniteau County uses access over its own property to conduct in-stream gravel mining or undertake any bank stabilization activity, it will allow the Corps access over the same property for the purpose of inspection.

14. For a period of five years from the date of entry of this Decree, Moniteau County will provide the Corps advance notice of the time and place of any streambed gravel mining or bank stabilization activity that it undertakes. The notice will be given at least three days before the date by which the Corps must give the landowner notice in order to gain access by the time the project begins. This does not apply to any bank stabilization activity that must be undertaken under an emergency that does not permit such advanced notice, but in such event notice will be given as soon as possible. The purpose of this provision is to permit the Corps to observe streambed gravel mining and bank stabilization activities while in process and/or immediately after completion. To this end, Moniteau County will cooperate in good faith with the Corps, and will provide times and places with sufficient specificity to permit the Corps to undertake such inspections efficiently and without multiple trips to the sites involved.

15. Beginning within sixty days following entry of this Decree, and continuously thereafter, Moniteau County will display a notice or notices, in a place or places reasonably calculated to be seen by the employees of the Moniteau County Road and Bridge Department, and future Commissioners of Moniteau County, that inform such employees and Commissioners of the applicability of the CWA to in-stream gravel mining and bank stabilization activities, and of the Corps permit requirements for such activities. Within sixty days of, and for a period of five years following, the entry of this Decree, Moniteau County will similarly post notices of the

requirements of paragraphs 12, 13, 14 and 23 of this Decree. Moniteau County may consult with the Corps concerning the content of these notices.

16. Moniteau County will cooperate with the Corps to arrange a meeting, to occur as promptly as possible following the entry of this Decree, and then annually thereafter until a total of five annual meetings have been held at a time and place reasonably suitable to Moniteau County and the Corps, at which a representative or representatives of the Corps may address the employees of the Moniteau County Road and Bridge Department and Commissioners of Moniteau County concerning the requirements of the CWA, and answer questions. Moniteau County and the Corps will each bear their own expenses of holding these meetings. In conjunction with the first meeting, the Commissioners of Moniteau County and their counsel will meet with representatives of the Corps and its counsel to discuss the possibility of a memorandum of understanding or other form of agreement providing for an informal process by which any future violation or potential violation of the CWA within the Corps' jurisdiction may be resolved. Neither the Corps nor Moniteau County will be obligated to enter such agreement or to agree to any particular term of such agreement.

17. The injunctive provisions of this Decree apply to Moniteau County whether it performs in-stream gravel mining or bank stabilization activities through its own employees, or contracts with another party to perform them. In the event that Moniteau County contracts with another party to perform work that is subject to the Decree, Moniteau County will require of the contractor that it conform to the provisions of this Decree. Paragraphs 12, 13, 14 and 23 of this Decree are intended to be binding on any contractor of Moniteau County who has notice of them.

IV. RESTORATION AND MITIGATION

18. During 2001, Moniteau County placed six turkey crates filled with rock, each crate approximately 15 feet long, 4 feet wide and 7 feet high, into Splice Creek, in a continuous fashion, at a point approximately 4600 feet upstream of the Route H bridge, along the left descending bank of Splice Creek, for the purpose of bank stabilization. Moniteau County will monitor the Site and the condition of these turkey crates by observing them at least once each calendar month following the entry of this Decree. In the event that Moniteau County observes a condition that constitutes a “triggering event” as defined in paragraph 21, within two business days thereafter it will so notify the Corps.

19. Within six months after entry of this Decree and in every twelfth month thereafter, a representative of the Moniteau County Road and Bridge Department will perform a detailed inspection of the turkey crates to determine whether a triggering event has occurred. Within two weeks after each of these inspections, Moniteau County will mail, email, fax or deliver to the Corps a report of the inspection, which will give the name and phone number of the person doing the inspection, the date and time of the inspection, a short narrative statement describing any changes in the condition of the structure, including any increased creekward leaning, any weld breaks, and any spillage from or collapse of a crate. The report will include photographs of the structure from an upstream and downstream position.

20. Within 10 days of a “triggering event” as defined below, Moniteau County will undertake as expeditiously as possible to secure Corps approval of a plan to remove the turkey crates, mitigate any adverse effects of any collapse of or spillage from the crates or of the removal process, and to replace them, if Moniteau County chooses to replace them, with suitable structures. Moniteau County will not refuse reasonable modifications to the plan deemed by the

Corps necessary for environmental protection. Upon approval of Moniteau County's proposed plan or a reasonable alternative plan by the Corps, Moniteau County will proceed as promptly and expeditiously as possible to execute it. Upon the request of Moniteau County, the Corps will consult with Moniteau County in advance of a triggering event regarding appropriate removal, mitigation and replacement procedures. Removal or replacement of the crates before a triggering event occurs, pursuant to a Corps permit under CWA Section 404, will be deemed to satisfy this paragraph.

21. A "triggering event" will be deemed to have occurred when (1) Moniteau County determines, in the exercise of its discretion, that one or more of the crates have collapsed, fallen into Splice Creek, leaned creekward to 45 degrees from vertical, or broken open, or that some change in the condition of the structure has presented a significant increased impact on the flow of Splice Creek; or that there is reason to believe that such event is likely to occur within 90 days of an inspection; (2) the Corps determines, in the exercise of its discretion, that one or more of the crates has collapsed, fallen into Splice Creek, leaned creekward to 45 degrees from vertical, or broken open, or that some change in the condition of the structure has presented a significant increased impact on the flow of Splice Creek; or that there is reason to believe that such event is likely to occur within 90 days of an inspection; and the Corps opts in its discretion to declare this a triggering event and so notifies Moniteau County; or (3) the Corps is denied legal access or in its judgment is unreasonably delayed in gaining access to the Splice Creek Site for the purpose of inspecting the turkey crates, opts in its discretion to declare this a triggering event, and so notifies Moniteau County.

V. ROAD CROSSING UPGRADES

22. Moniteau County agrees to expend \$20,000 - \$25,000 over the next three years to undertake the installation of hardened, at-grade crossings at locations where there are existing unimproved county road fords across waters of the United States. The specific locations will be mutually determined by Moniteau County and the Corps.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

23. For a period of five years after entry of this Decree, Moniteau County shall preserve and retain all records and documents that its employees or officials create or which come into their possession or control that relate to in-stream gravel mining, bank stabilization, or compliance with this Decree. For the same period, Moniteau County shall also instruct its contractors to preserve all such documents.

24. Upon reasonable notice, the Corps will be permitted to review the documents retained in accordance with the above paragraph. At the conclusion of the document retention period, Moniteau County shall notify the Corps at least 90 days prior to the destruction of any such records or documents, and, upon request by the Corps, Moniteau County shall deliver any such records or documents to the Corps. Moniteau County may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Moniteau County asserts such a privilege, it shall provide the Corps with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Moniteau

County. However, no documents, reports or other information created or generated pursuant to the requirements of the Decree shall be withheld on the grounds that they are privileged.

25. A. For a period of five years following entry of this Decree or until the requirements of paragraph 20 are fulfilled, whichever is later, the Corps and its authorized representatives and contractors shall have authority at all reasonable times to enter the Defendants premises to:

- (1) Monitor the activities required by this Decree;
- (2) Verify any data or information submitted to the Corps pursuant to this Decree;
- (3) Inspect and evaluate Moniteau County's restoration and/or mitigation activities; and
- (4) Inspect and review any records required to be kept under the terms and conditions of this Decree and the CWA.

B. This provision of this Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law, or any right of entry or access provided for in any other paragraph of this Decree.

VII. DISPUTE RESOLUTION

26. Any dispute that arises with respect to the meaning or requirements of this Decree shall be, in the first instance, the subject of informal negotiations between the United States (including the Corps) and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless

agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution.

27. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. The resolution of a dispute by the Court under paragraph 26 or 27 will be made in accordance with the objectives of this Decree and the CWA.

28. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Decree.

VIII. FORCE MAJEURE

29. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Decree within the specified time period.

A Force Majeure event does not include, *inter alia*, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

30. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Decree, Defendants shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and
- D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

31. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with the Corps to determine when to begin or resume the operations that had been affected by any Force Majeure event.

32. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VII of this Decree.

33. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

IX. PENALTIES FOR NON-COMPLIANCE

34. If Moniteau County violates this Decree, the court shall assess such penalty upon Moniteau County as the court determines is appropriate under the circumstances. If such violation is a violation of the CWA, this provision shall not prejudice any right, remedy or penalty available to the United States or any of its agencies under the CWA.

X. NOTICES

35. All notices and communications required or allowed under this Decree shall be made to the parties through each of the following persons and addresses:

A. TO THE CORPS:

U.S. Corps of Engineers
Chief, Regulatory Branch
601 E. 12th Street
700 Federal Building
Kansas City, MO 64106
(816) 983-3990

B. TO DEFENDANTS:

John T. Kay
405 N. High Street
California, MO 65018
(573) 796-2186
Attorney for Moniteau County and Commissioners of Moniteau County

Moniteau County Clerk
Moniteau County Courthouse
200 E. Main
California, MO 65018
(573) 796-2071

36. Parties will give notice of any change of designee or address, which will then become effective for the purpose of this section.

XI. COSTS OF SUIT

37. Each party to this Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Decree, Defendants shall be liable for reasonable costs or attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Decree.

XII. PUBLIC COMMENT

38. The parties acknowledge that after the lodging and before the entry of this Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any

provision of this Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Decree.

XIII. CONTINUING JURISDICTION OF THE COURT

39. This Court shall retain jurisdiction over this action in order to enforce or modify the Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Decree. During the pendency of the Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Decree. No provision of this Decree shall be construed to limit any remedy that the Court would otherwise have in the event that any person acts in contempt of this Decree.

XIV. MODIFICATION

40. Upon its entry by the Court, this Decree shall have the force and effect of a final judgment. Any modification of this Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2005.

United States District Judge

APPROVALS:

ON BEHALF OF THE UNITED STATES:

Todd P. Graves
United States Attorney for the
Western District of Missouri

Date: Oct 3, 2005

By: Charles M. Thomas
Charles M. Thomas, MO # 28522
Assistant United States Attorney

Date: Oct 3, 2005

By: J. P. Brown
Jane Pansing Brown, MO # 30658
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, Room 5510
Kansas City, Missouri 64106
Telephone: (816) 426-3130

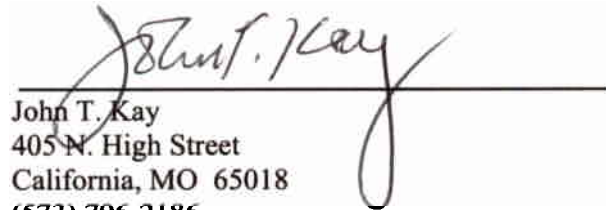
ON BEHALF OF THE UNITED STATES ARMY
CORPS OF ENGINEERS:

Dated: 3 October, 2005

Kenneth W. Bond

ON BEHALF OF MONITEAU COUNTY AND
THE COMMISSIONERS OF MONITEAU
COUNTY:

Dated: 5/12, 2005



John T. Kay
405 N. High Street
California, MO 65018
(573) 796-2186

Fax: (573) 796-2391

Attorney for Moniteau County and Commissioners
of Moniteau County

Dated: 12 May, 2005


Kenneth Kunze, Commissioner of Moniteau County

Dated: May 12, 2005


Tony Barry, Commissioner of Moniteau County

Dated: MAY 12, 2005


Kim F. Roll, Commissioner of Moniteau County